LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 18 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 765

JAMES R. HOFFA, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT and CALVIN KOVENS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

MAURICE J. WALSH
29 S. La Salle Street
Chicago, Illinois 60603
and
MORRIS A. SHENKER
408 Olive Street
St. Louis, Missouri
Counsel for Petitioner Hoffa

JACQUES M. SCHIFFER
46 Andover Road
Rockville Center
Long Island, New York
Counsel for Petitioners
Weinblatt and Burris

LOUIS G. SHUSHAN
550 Saratoga Building
New Orleans, Louisiana 70112
Counsel for Petitioner Strate

HARVEY M. SILETS
7 South Dearborn Street
Chicago, Illinois 60603
Counsel for Petitioner Kovens

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 765

JAMES R. HOFFA, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT and CALVIN KOVENS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

PETITIONERS' BRIEF

I. Trial Court's Communications to Deliberating Jury in Absence of Defendants and Their Counsel Violates Sixth Amendment Rights.

A panel of three Judges of the Seventh Circuit Court of Appeals entered an order on November 12, 1970, in **United States v. David Dellinger**, No. 18,295 (also sometimes called the "Chicago Seven" trial), remanding the case back to the District Court for a hearing for the reason that the trial Judge allegedly communicated, *via* the

deputy marshals, with the jury during its deliberations.[1] Said communications allegedly took place outside the presence and without the knowledge of the defendants and their counsel. The Seventh Circuit's order provides that at the hearing both the government and the defense could subpoena witnesses, including all the jurors and the deputy marshals who were in charge of the jury. A copy of the Court's Order is attached to this supplemental brief as an Appendix thereto.

The very first "Question Presented" and Point I in the instant petition (Petition, p. 51) urges this Court to grant certiorari in order to decide the following question:

> "Can criminal convictions stand where a trial judge, in the absence of defendants and their counsel, communicates to a deliberating jury in response to its ambiguous inquiry about the case?"

As shown in the petition, the Seventh Circuit's decision is in conflict with **Shields v. United States**, 273 U. S. 583, and decisions of many Courts of Appeals. Further, as we pointed out in the petition, it is apparent that many Federal trial judges are continuing to disregard the Sixth Amendment right of a defendant to be present with counsel at all stages of the trial, including responses to jury inquiries (Petition, p. 56). Thus, we urged then and we urge now, that this Court's review of this important issue is needed to secure better trial judge compliance with the Sixth Amendment.

In **United States v. Dellinger** the Seventh Circuit has ordered that the defense may subpoena jurors for the pur-

---

[1] The panel of three Judges consist of Luther M. Swygert, Chief Judge, and Roger J. Kiley and Thomas A. Fairchild, Circuit Judges. Chief Judge Swygert also sat on the panel that affirmed the convictions in the instant Hoffa case by a 2 to 1 margin. Chief Judge Swygert wrote a lengthy dissent, holding among other things, that the trial Judge's communications with the jury was reversible error (See Petition, App. 42).

pose of taking their testimony. Similar attempts by the defense in the instant Skilling case were refused by the trial Judge and such refusal was approved by the Seventh Circuit even though it was proved that prejudicial newspaper stories reached the sequestered jury (See Point II, p. 88).

The Seventh Circuit's recent order in Dellinger is in apparent conflict with its earlier 2 to 1 decision in Skilling, which approved the trial Court's action in not permitting the defense to interrogate any of the jurors, even though it was clear that they had violated the trial Court's instructions not to read anything about the case, etc. We urge this Court to grant certiorari here in order to review this obvious conflict between two panels of the Seventh Circuit.

II. A Cautionary Instruction Can Not Erase From the Minds of the Jury Prejudicial and Highly Inflammatory Confessions Which Are Excluded From Evidence.

In the instant case, co-defendant Dranow testified on his own behalf. The government sought to impeach that testimony through the use of certain letters written by Dranow which indicated that he was demanding a pay-off from several co-defendants for accepting criminal blame for the allegations contained in the indictment. The evidence was considered by the jury for six days before the trial judge withdrew same and gave a cautionary instruction (see Petition, p. 75).

We urge in our petition that the trial Court's cautionary instruction could not cure the prejudice, relying principally upon this Court's decision in Bruton v. United States, 391 U. S. 123. The majority below held that there was no error and distinguished Bruton on the basis that "Dranow was a witness at the trial . . ." whereas in Bruton, the co-defendant did not testify.

On November 9, 1970, this Court granted the state's petition for writ of certiorari on this same issue. *Wilson v. O'Neill*, No. 336, 39 U. S. Law Rep. 3193. In *Wilson*, the co-defendant took the stand and denied making the confession.

We respectfully urge this Court to grant our petition so that the issue raised in the instant case and in *Wilson* may be considered at the same time.

Respectfully submitted

MAURICE J. WALSH
29 South LaSalle Street
Chicago, Illinois 60603

and

MORRIS A. SHENKER
408 Olive Street
St. Louis, Missouri
Counsel for Petitioner Hoffa

LOUIS G. SHUSHAN
530 Saratoga Building
New Orleans, Louisiana 70112
Counsel for Petitioner Strate

JACQUES M. SCHIFFER
46 Andover Road
Rockville Center
Long Island, New York
Counsel for Petitioners Weinblatt and Burris

HARVEY M. SILETS
7 South Dearborn Street
Chicago, Illinois 60603
Counsel for Petitioner Kovens